

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SARAH A. BURNHAM
Claimant

VS.

U.S.D. NO. 500
Self-Insured Respondent

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Docket No. 1,039,158

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 23, 2009, Award entered by Administrative Law Judge Steven J. Howard. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for the self-insured respondent. At the request of the parties, the Board placed this case on its summary calendar for disposition without oral argument.

The Administrative Law Judge (ALJ) found that claimant sustained accidental injuries at work on August 24, 2006, and February 21, 2008, but the accident in February 2008 resulted in only a temporary aggravation of claimant's preexisting injury with no additional permanent impairment. As relates to the August 24, 2006, date of accident, the ALJ found that claimant had a 7 percent permanent partial impairment to the whole body as a whole based on the independent medical examination (IME) report of Dr. Edward Prostic.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues that Dr. Prostic's 7 percent permanent functional impairment opinion is not admissible probative evidence that can be considered in determining claimant's permanent partial impairment rating because he did not indicate in his IME

report that he utilized the *AMA Guides*¹ as required by K.S.A. 44-510e. Claimant contends that Dr. P. Brent Koprivica's 10 percent functional impairment rating is the only rating contained in the record established by competent medical evidence based on the *AMA Guides*. In the event the Board finds that Dr. Prostic's impairment rating is admissible, claimant requests that the Board give Dr. Koprivica's rating equal weight, which would result in a modification of the ALJ's Award from a 7 percent permanent partial general disability to an 8.5 percent general disability.

Respondent requests the Board affirm the ALJ's finding that claimant had a 7 percent functional impairment, arguing that Dr. Koprivica used the range of motion model rather than the preferred diagnosis related estimate (DRE) model. Further, respondent contends that Dr. Prostic's rating opinion should be considered as evidence in the case because the ALJ's order for an IME specified that the *AMA Guides* be referenced in finding claimant's functional impairment.

The issues for the Board's review are:

(1) Can Dr. Prostic's 7 percent permanent partial impairment rating be considered as evidence in this record because he did not indicate in his IME report that he utilized the *AMA Guides* in calculating the rating?

(2) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant works for respondent as a speech language pathologist. On August 24, 2006, she slipped and fell on some water in a hallway at school. She had a large bruise on her leg and her low back was hurt. The bruise went away, but the low back continued to hurt. Respondent sent her to Concentra, where she was given muscle relaxers and pain pills and was sent to physical therapy. She was eventually referred to Dr. Adrian Jackson and then to Dr. Joseph Galate. Dr. Galate gave her two back injections, and Dr. Jackson sent her to more physical therapy. Claimant continued to work during this time, although she missed some days because of pain. She was released from treatment by Dr. Jackson on January 17, 2007. At that time, she still had low back pain. She was given exercises to perform at home by the physical therapist, but Dr. Jackson did not prescribe medication for her after her release.

On February 21, 2008, claimant was getting into her car in the respondent's parking lot. As she stepped into her car, her foot slipped on some ice and snow. She did not fall to the ground, but she felt her back pull. She was eventually sent to see Dr. Jackson again

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

on September 5, 2008. He sent her back to physical therapy, originally ordering four weeks of therapy. But for some reason unknown to claimant, he cut her physical therapy short and released her from treatment, finding her to be at maximum medical improvement. Claimant said that right after her second accident, her low back was pretty sore, but then it went back to where it was before the second accident occurred. She continues doing her home exercises when it does not hurt her back. She has also, on her own, hired a personal trainer to help her find ways to exercise and strengthen her back. She takes Aleve for the pain three or four times a week.

Claimant said that she continues to have constant low back pain that affects her when she sits for long periods. She cannot do her yard work or housecleaning. It is hard for her to sleep because of the pain. Walking up and down stairs is uncomfortable. At the time of the regular hearing, her pain level was a 3 to 4 on a scale of 0 to 10. On days she hurts too badly to go to work, it will be an 8 or 9.

Dr. P. Brent Koprivica, a board certified independent medical examiner, evaluated claimant on two occasions, both at the request of claimant's attorney. He first examined her on May 14, 2008, for the purpose of providing an opinion in regard to claimant's need for additional medical treatment. He subsequently saw claimant on November 14, 2008, for the purpose of providing an impairment rating. He performed complete evaluations on both those occasions.

After examining claimant on November 14, 2008, Dr. Koprivica found she was at maximum medical improvement. Dr. Koprivica stated that claimant should have conservative management of her low back pain, which he believes is a chronic condition. He testified that in his opinion, as a result of the August 24, 2006, injury, claimant had a 10 percent whole person impairment. As a result of the February 21, 2008, injury, he believed claimant had an additional 5 percent whole person impairment. He utilized the Range of Motion model in the *AMA Guides* in calculating claimant's impairments.

Dr. Koprivica stated that under the Range of Motion model in the *AMA Guides*, there are three considerations for impairment: structural problems, deficits of motion in the spine, and permanent neurologic deficit that is ongoing. He rated claimant as having an 8 percent impairment for structural problems and a 9 percent impairment for deficits in range of motion. He found claimant had 0 percent for permanent neurological deficit. Using the Combined Values Chart, the 8 and 9 percent impairments combine for 16 percent, which he rounded down to 15 percent. He believes the 15 percent impairment rating represents the effect the injury has had on her activities of daily living.

Dr. Koprivica said he did not use the DRE model because claimant had changes at both L5-S1 and L4-L5, and the DRE model only looks at one motion segment involvement. Because claimant had multi-level involvement, Dr. Koprivica believed the Range of Motion model was the more appropriate. He believed that using the DRE model, he would find that claimant was in Category III or 10 percent after the first injury, and the second injury,

a chronic soft tissue injury, would be in Category II, or 5 percent. Those impairments would combine to 15 percent, the same impairment he ultimately found using the Range of Motion model.

Dr. Koprivica acknowledged that on November 14, 2008, when he examined claimant, she had no radicular symptoms. So, on that date, using the DRE model, claimant would have been in Category II for a 5 percent impairment. He stated that, however, if during treatment claimant had radicular symptoms, then there would be an argument that she could have been in Category III, even though the symptoms had gone away.

Dr. Edward Prostic examined claimant on March 6, 2009, at the request of the ALJ. Claimant described her accident of August 24, 2006, when she slipped on a water spill and fell, injuring her low back. She also told him that she had a subsequent event when she slipped and twisted on some ice at work and temporarily aggravated her back. She told Dr. Prostic that she continues to have pain across her low back at and below the waist without radiculopathy.

After examining claimant, Dr. Prostic opined that she had sustained injury to her low back on or about August 24, 2006, and that most likely the injury was at the L5-S1 segment. He recommended conservative care by way of intermittent heat or ice and massage, therapeutic exercises, and anti-inflammatory medication as needed. He rated her impairment at 7 percent of the body as a whole on a functional basis. He did not cite the *AMA Guides*, and did not explain in his report how he came to find that claimant had a 7 percent functional impairment.

PRINCIPLES OF LAW AND ANALYSIS

(1) Can Dr. Prostic's 7 percent permanent partial impairment rating be considered as evidence in this record because he did not indicate in his IME report that he utilized the *AMA Guides* in calculating the rating?

K.S.A. 44-510e(a) states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Following a February 9, 2009, preliminary hearing settlement conference, the ALJ entered an Order appointing Dr. Prostic as a neutral physician to perform an evaluation on claimant. The ALJ specified in his Order that Dr. Prostic was to rate claimant's percentage of functional impairment using the 4th edition of the *AMA Guides*: "(physician to reference

AMA 4th Edition Guides—please include page, chart, etc.).”² Dr. Prostic’s report, however, makes no mention of the *AMA Guides*, nor does it specify how the doctor arrived at his 7 percent permanent partial impairment rating. Dr. Prostic was not deposed and, therefore, he was not asked whether he used the 4th edition of the *AMA Guides* in formulating his opinion.

Respondent argues it is implicit in the doctor’s opinion that he followed the *AMA Guides* in arriving at his rating because the ALJ’s Order mandates such. But the fact that Dr. Prostic failed to comply with the ALJ’s mandate to reference the *AMA Guides* in his report and to cite the page and chart suggests that either Dr. Prostic did not read the ALJ’s Order carefully or chose to ignore it.³ Per K.S.A. 44-516, Dr. Prostic’s IME report is in evidence, but his impairment rating does not conform to the requirements of K.S.A. 44-510e and, therefore, cannot be used for purposes of claimant’s impairment and permanent partial disability.

The Board finds the ALJ erred in considering Dr. Prostic’s functional impairment rating.

(2) What is the nature and extent of claimant’s disability?

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The record contains only one competent opinion from a physician as to the percentage of claimant’s functional impairment. Dr. Koprivica determined claimant’s permanent impairment of function was 10 percent per the 4th edition of the *AMA Guides*. The Board finds Dr. Koprivica’s 10 percent rating is credible and should be adopted.

² ALJ Order (Feb. 10, 2009) at 1.

³ The ALJ’s Order only asks Dr. Prostic to provide a rating. It does not ask for treatment recommendations. Nevertheless, Dr. Prostic gives his recommendation for treatment in his report.

CONCLUSION

(1) Dr. Prostic's opinion concerning claimant's percentage of permanent functional impairment cannot be considered because he failed to indicate whether his rating was based upon the 4th edition of the *AMA Guides*.

(2) Claimant's permanent partial disability is 10 percent to her body as a whole.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated September 23, 2009, is modified to find that claimant has a 10 percent permanent partial disability to the body as a whole.

Claimant is entitled to 41.5 weeks of permanent partial disability compensation at the rate of \$483 per week or \$20,044.50 for a 10 percent functional disability, making a total award of \$20,044.50, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge